Public Prosecutor v Mohamad Khairi bin Bahauddin

HIGH COURT (IPOH) — CRIMINAL APPEAL NO 42H-19–04 OF 2014
NOORIN BADARUDDIN JC
14 OCTOBER 2014

Criminal Procedure — Appeal — Appeal against sentences — Accused person convicted for offence of rape and two offences of robbery — Sentences to 15 years of imprisonment and five strokes of whipping in first charge and five years of imprisonment for second charge — Sentences ordered to run concurrently by sessions court — Appeal by prosecution — Whether sentences adequate — Whether sessions court judge ('SCJ') erred in ordering sentences to run concurrently — Whether SCJ took into account seriousness of offence of rape and armed robbery — Penal Code ss 376 & 392

In two cases before the sessions court, the respondent was convicted for an offence of rape and two offences of robbery under ss 376 and 392 of the Penal Code and was sentenced to 15 years of imprisonment and five strokes of whipping in the first charge while in the second charge, he was sentenced to five years of imprisonment and two strokes of whipping. The sentences in both cases were ordered to run concurrently. The prosecution ('the appellant') was dissatisfied with the sentences and hence this appeal. The appellant argued that the sentences were manifestly inadequate as the offences committed by the respondent were serious offences and that the sessions court judge ('the SCJ') had erred in ordering the sentences to run concurrently; the SCJ failed to take into account the seriousness of the offence of rape and armed robbery. The appellant summed up her submissions by highlighting that the previous convictions showed that the respondent had committed the crimes of rape and robbery more than one occasion. The appellant prayed for all the sentences to run consecutively after the respondent had served the sentence for another offence of rape where he was sentenced to eight years of imprisonment.

Held, allowing the appeal:

(1) There were cogent reasons to interfere with the findings made by the SCJ. On the facts of this case, to impose the concurrent sentences would not be appropriate as it did not reflect the seriousness of the offence committed by the respondent (see para 20).

(2) Even though the rape and the robbery were committed on the same victim in the first and second charge of the first case, and in the first and second charge of the second case and committed at around the same time and at the same place, there was no necessity to commit the second offence after committing the first. Both the offences did not depend on

each other. They were obviously distinct in nature and unrelated. The offence of rape and robbery could not be said to be subsidiary to one another. Different victims were involved in both cases. Each and every element of the one transaction principles must exist for the one transaction rule to apply and for a concurrent sentence to be imposed (see para 18).

(3) The judgment of the SCJ failed to illuminate the reasons that compelled him to order the sentence of imprisonment to be concurrent in respect of all the offences. In fact, there was no justification at all in the said judgment of the SCJ on why the sentences were to run concurrently. The SCJ gave so much weight to the plea of guilty of the respondent that in stating he took into account the public interest, seriousness of the crimes committed and the antecedents of the same crimes committed by the respondent, he failed to reflect these factors in his findings and sentences imposed. The SCJ was just paying lip service by saying the crime committed was serious and that he had taken into account the public interest (see para 19).

(4) Rape and robbery are heinous crime which must be severely punished. In this case there were three victims. Three of them were robbed. Two of the victims were also raped. In committing the crimes, the respondent had also used dangerous weapon to threaten the victims. The victims' lives were at stake during the incidents. The sentences passed must truly reflect the fact that in this case the respondent had committed three distinct offences and that he was being duly punished. This could only be achieved by ordering the sentences to run consecutively (see para 21).

[Bahasa Malaysia summary

Dalam kedua-dua kes di hadapan mahkamah sesyen, responden disabitkan untuk kesalahan merogol dan dua kesalahan merompak di bawah ss 376 dan 392 Kanun Keseksaan dan dijatuhkan hukuman 15 tahun penjara dan lima sebatan rotan dalam tuduhan pertama sementara di dalam tuduhan kedua, dia dijatuhkan hukuman lima tahun penjara dan dua sebatan rotan. Hukuman-hukuman dalam kedua-dua kes diperintahkan untuk berjalan serentak. Pihak pendakwaan ('perayu') tidak berpuas hati dengan hukuman-hukuman yang dijatuhkan, maka merayu hukuman itu. Perayu berhujah bahawa hukuman-hukuman adalah amat tidak mencukupi kerana kesalahan yang dilakukan oleh responden adalah kesalahan serius dan hakim mahkamah sesyen ('HMS') telah tersilap dalam memerintah untuk hukuman-hukuman berjalan serentak; HMS gagal untuk mengambil kira keseriusan kesalahan merogol dan rompakan bersenjata. Perayu meringkaskan hujahannya dengan menekankan bahawa sabitan sebelumnya menunjukkan bahawa responden telah melakukan jenayah merogol dan merompak lebih daripada satu kali. Perayu memohon untuk kesemua hukuman dijalankan secara berturutan selepas responden telah menjalani hukuman untuk

kesalahan rogol yang lain di mana dia dijatuhkan hukuman penjara lapan tahun . A

Diputuskan, membenarkan rayuan:

(1) Terdapat alasan nyata untuk campur tangan dengan dapatan HMS. Berdasarkan fakta kes ini, untuk mengenakan hukuman-hukuman serentak tidak akan menjadi wajar kerana ia tidak membayangkan keseriusan kesalahan yang dilakukan oleh responden (lihat perenggan 20). B

(2) Walaupun rogol dan rompakan dilakukan ke atas mangsa yang sama dalam tuduhan pertama dan kedua kes pertama, dan dalam tuduhan pertama dan kedua kes kedua dan dilakukan lebih kurang pada masa yang sama, tidak terdapat keperluan untuk melakukan kesalahan kedua selepas melakukan kesalahan yang pertama. Kedua-dua kesalahan tidak bergantung antara satu sama lain. Ia jelas berbeza dalam sifat dan tidak berkaitan. Kesalahan rogol dan rompakan tidak dapat dikatakan menjadi subsidiari kepada satu sama lain. Mangsa yang berbeza terlibat dalam kedua-dua kes. Setiap unsur prinsip satu transaksi mesti wujud untuk peraturan satu transaksi beraplikasi dan untuk hukuman serentak dikenakan (lihat perenggan 18). C D E

(3) Penghakiman HMS gagal untuk menjelaskan alasan-alasan yang mendorong beliau untuk memerintah hukuman penjara untuk dijalankan serentak berkaitan kesemua kesalahan tersebut. Sebenarnya, langsung tidak terdapat justifikasi dalam penghakiman HMS tersebut atas mengapa hukuman-hukuman dikehendaki berjalan serentak. HMS memberi timbangan berat kepada pli bersalah responden bahawa dalam menyatakan yang beliau mengambil kira kepentingan awam, keseriusan jenayah yang dilakukan dan jenayah yang sama sebelum itu yang dilakukan oleh responden, beliau gagal untuk membayangkan faktor-faktor ini dalam dapatannya dan hukuman yang dikenakan. HMS hanya bercakap kosong dengan menyatakan jenayah yang dilakukan adalah serius dan beliau telah mengambil kira kepentingan awam (lihat perenggan 19). F G H

(4) Rogol dan rompakan adalah jenayah yang amat kejam yang mesti dihukum keras. Dalam kes ini terdapat tiga mangsa. Ketiga-tiga mereka dirompak. Dua daripada mangsa juga dirogol. Dalam melakukan jenayah, responden juga telah menggunakan senjata berbahaya untuk mengugut mangsa-mangsa. Nyawa mangsa adalah terancam semasa kejadian tersebut. Hukuman-hukuman yang dijatuhkan mesti membayangkan dengan benar bahawa fakta dalam kes ini responden telah melakukan ketiga-tiga kesalahan berbeza dan bahawa dia telah dihukum sewajarnya. Ini hanya boleh dicapai dengan memerintahkan I

hukuman-hukuman untuk berjalan secara berturutan (lihat perenggan 21).]]]]]]]]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 375–432.

Cases referred to

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (refd)
Mohd Zandere bin Ariffin v PP [2006] 5 MLJ 685, HC (refd)
PP v Govindnan a/l Chinden Nair [1998] 2 MLJ 181; [1998] 2 CLJ 370, HC (refd)

Legislation referred to

Criminal Procedure Code ss 282(d), 292
Penal Code ss 354, 376, 392, 397

DPP How May Ling for the appellant.
Ranjit Singh (Mohamad Hafiz with him) for the respondent.

Noorin Badaruddin JC:

[1] This is an appeal by the public prosecutor (appellant) against the sentence passed by the learned sessions court judge on the respondent for three offences in Case No MS 62JS-1–08 of 2013 and two offences in Case No MS 62JS-2–08 of 2013.

[2] The charges are:

MS62JS-1-08 of 2013

First charge

Bahawa kamu pada 7.8.2010 jam lebih kurang 6.40 pagi hingga jam 7.15 pagi bertempat di rumah No. 30, Lebuh Prajurit 3, Taman Ipoh Timur, Ipoh di dalam daerah Kinta, di dalam Negeri Perak, telah melakukan rogol ke atas seorang perempuan nama LOW MEI SAN No. KPT: 921209-08-5858 yang berumur 17 tahun 7 bulan. Oleh yang demikan kamu telah melakukan kesalahan yang boleh hukum di bawah seksyen 376 Kanun Keseksaan.

Second charge

Bahawa kamu pada 7.8.2010 jam lebih kurang 6.40 pagi hingga jam 7.15 pagi bertempat di rumah No. 30, Lebuh Prajurit 3, Taman Ipoh Timur, Ipoh di dalam daerah Kinta, di dalam Negeri Perak, telah melakukan jenayah samun iaitu sebuah DVD player, sebuah telefon bimbit jenis Sony Ericsson, wang tunai sebanyak RM500/- dan sebuah DVD player jenama LG milik LOW MEI SAN No. KPT:

921209-08-5858 dan bersenjatakan pisau pemotong sayur. Oleh yang demikian kamu telah melakukan kesalahan yang boleh hukum di bawah seksyen 392/397 Kanun Keseksaan.

Third charge

Bahawa kamu pada 7.8.2010 jam lebih kurang 6.40 pagi hingga jam 7.15 pagi bertempat di rumah No. 30, Lebuh Prajurit 3, Taman Ipoh Timur, Ipoh di dalam daerah Kinta, di dalam Negeri Perak, telah melakukan jenayah samun berupa sebuah telefon bimbit jenis Sony Ericsson W995 dan wang tunai sebanyak RM40/- milik CHONG HOOI LING No. KPT.910509-08-6162 dan bersenjatakan pisau pemotong sayur. Oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 392/397 Kanun Keseksaan.

MS62JS-2-08 of 2013.

First charge

Bahawa kamu pada 7.8.2010 jam lebih kurang 6.40 pagi hingga jam 7.15 pagi bertempat di rumah No. 30, Lebuh Prajurit 3, Taman Ipoh Timur, Ipoh di dalam daerah Kinta, di dalam Negeri Perak, telah melakukan rogol ke atas seorang perempuan nama LIM MEI SIM No. KPT: 920723-08-5258 yang berumur 18 tahun. Oleh yang demikian kamu telah melakukan kesalahan yang boleh hukum di bawah seksyen 376 Kanun Keseksaan.

Second charge

Bahawa kamu pada 7.80.2010 jam lebih kurang 6.40 pagi hingga jam 7.15 pagi bertempat di rumah No. 30, Lebuh Prajurit 3, Taman Ipoh Timur, Ipoh, di dalam daerah Kinta, di dalam Negeri Perak, telah melakukan jenayah samun iaitu sebuah DVD player, sebuah telefon bimbit jenis Sony Ericsson, wang tunai sebanyak RM500/- dan sebuah DVD player jenama LG milik LIM MEI SIM No. KPT: 920723-08-5258 yang berumur 18 tahun dan bersenjatakan pisau pemotong sayur. Oleh yang demikian, kamu telah melakukan kesalahan yang boleh hukum di bawah seksyen 392/397 Kanun Keseksaan.

[3] On 26 March 2014, the respondent pleaded guilty to all the charges stated above and the learned sessions court judge sentenced him as follows:

MS62JS-1-08 of 2013

(a) First charge (Section 376 Penal Code):

15 years of imprisonment from the date of arrest 14.10.2010 and 5 strokes of whipping.

(b) Second and Third Charge (Section 392/s 397 Penal Code):

5 years of imprisonment from the date of arrest 14.10.2010 and 2 strokes of whipping.

MS62JS-2-08 of 2013.

(a) First Charge (Section 376 Penal Code):

15 years of imprisonment from the date of arrest 14.10.2010 and 5 strokes of whipping.

(b) Second charge (Section 392/397 Penal Code):

5 years of imprisonment from the date of arrest 14.10.2010 and 2 strokes of whipping.

[4] The facts of the case tendered by the prosecution at the sessions court are reproduced below:

FAKTA KES:

1. Pada 7.8.2010 jam di antara 6.00 pagi hingga 7.15 pagi, Lim Mei Sim (Pengadu) No. KP:920723-08-5258 yang ketika itu berada dalam rumah beralamat di rumah No. 30, Lebuh Prajurit 3, Taman Ipoh Timur, 31400, Ipoh, Perak (tempat kejadian), ketika itu sedang bersiap-siap dalam bilik hendak pergi bekerja bersama dengan rakan sebiliknya iaitu Low Mei San No. KP: 921209-08-5858 (rakan sebilik). Tiba-tiba pintu bilik dibuka dengan kuatnya oleh seorang lelaki memakai t-shirt berkolar warna ungu, seluar slack, badan tegap, tinggi 170-180cm, yang ketika itu memakai topi keledar yang bertutup sambil membawa sebilah pisau memotong sayur serta mengacukan pisau kearah Pengadu dan rakan sebiliknya.

2. Pada masa itu, Pengadu dan rakan sebiliknya diarah oleh lelaki tersebut iaitu Mohamad Khairi bin Bahauddin (Tertuduh) untuk menyerahkan apa-apa barang berharga dan wang tunai. Tertuduh juga mengugut untuk pengadu dan rakan sebiliknya tidak menjerit dengan menyatakan 'mahu mati atau tidak mahu mati'.

3. Pengadu ketika itu menyerahkan dompetnya, dimana di dalamnya ada wang tunai sejumlah RM500.00 dan tertuduh juga mengambil sebuah DVD Player, sebuah telefon bimbit jenis Sony Erricson.

4. Manakala rakan sebilik pengadu pula yang juga dalam keadaan ketakutan turut menyerahkan dompetnya yang berisi wang sebanyak RM 150.00, kemudian rakan sebilik Pengadu melihat tertuduh mengambil sebuah telefon bimbit jenama Samsung model S8300 dan sebuah telefon bimbit jenama IPhone.

5. Setelah rompakan dibuat barang-barang tersebut dimasukkan oleh tertuduh di dalam sebuah plastik Tertuduh kemudiannya mengarahkan pengadu dan rakan sebiliknya pergi ke sebuah bilik lain yang ada dalam rumah itu sambil mengacu pisau tersebut dan menyuruh pengadu serta rakan sebiliknya duduk di atas sebuah katil. Lampu bilik tersebut dibuka. Tertuduh menyuruh pengadu dan rakan sebiliknya membuka pakaian mereka dan berbogel sambil mengugut sekali lagi, 'mahu mati atau tidak mahu mati'. Pengadu dan rakan sebiliknya separuh berbogel di hadapan tertuduh iaitu dengan membuka baju sahaja. Manakala tertuduh dalam keadaan melutut meraba-raba badan rakan sebilik pengadu beberapa kali dan kemudiannya meraba-raba badan pengadu beberapa kali.

6. Kemudiannya gambar badan pengadu dan rakan sebiliknya yang kedua-duanya dalam keadaan separuh bogel dirakam sebanyak 4 kali oleh tertuduh melalui telefon bimbitnya sendiri. Tertuduh mengarahkan pengadu dan rakan sebiliknya

membuka seluar. Pengadu dan rakan sebiliknya dalam keadaan berbogel pada waktu itu.

7. Tertuduh kemudiannya keluar ke dapur rumah tersebut untuk mencari dan mengambil minyak masak dan menyapu di bahagian zip seluarnya kerana zip seluar telah rosak Selepas itu pengadu dan rakan sebiliknya melihat tertuduh membuka seluarnya dan menyapu minyak di bahagian kemaluan tertuduh, kemaluan pengadu dan rakan sebiliknya serta buah dada pengadu dan rakan sebiliknya.

8. Pengadu dan rakan sebiliknya melihat tertuduh melancap sendiri dan tertuduh mengarahkan pengadu dan rakan sebiliknya bercium dan berbaring di atas katil. Tertuduh dalam keadaan berdiri manakala pengadu dan rakan sebiliknya diarah baring atas katil di bahagian hujung katil dalam posisi separuh badan di katil, tertuduh telah mengangkat kedua-dua kaki ke atas, rakan sebilik pengadu (Low Mei San) dan memasukkan terus kemaluannya ke dalam kemaluan rakan sebilik pengadu. Rakan sebilik pengadu berasa sakit. Tertuduh telah memasukkan dengan cara sorong tarik kemaluannya dalam kemaluan Low Mei San beberapa kali. Selepas itu mengarahkan pengadu dan rakan sebiliknya bercium.

9. Seterusnya, tertuduh turut menyuruh pengadu (Lim Mei Sim) baring atas katil di bahagian hujung katil dalam posisi separuh badan di katil, tertuduh telah mengangkat kedua-dua kaki ke atas, Pengadu dan memasukkan terus kemaluannya ke dalam kemaluan pengadu. Pengadu berasa sakit. Tertuduh telah memasukkan dengan cara sorong tarik kemaluannya dalam kemaluan Lim Mei Sim beberapa kali dan menyapu air maninya dengan sehelai tuala. Tertuduh kemudiannya menyuruh pengadu dan rakan sebilknya memakai pakaian semula dan pergi ke bilik yang lain dalam rumah tersebut.

10. Tertuduh kemudiannya menyuruh pengadu dan rakan sebiliknya ke bilik yang lain di bahagian atas rumah tiba-tiba pintu bilik yang lain pintu bilik diketuk oleh tertuduh dan dibuka oleh Chong Hooi Ling (rakan serumah pengadu). Tertuduh mengarahkan Chong Hooi Ling menyerahkan wang dan barang berharga. Rakan serumah pengadu menyerahkan wang sebanyak RM40.00, sebuah telefon bimbit jenis Sony Ericcson W995. Rakan serumah pengadu juga dalam keadaan ketakutan kerana pisau diacu kearah muka mereka. Setelah selesai melakukan rompakan, tertuduh telah pun melarikan diri.

11. Pengadu kemudiannya membuat repot polis sepertimana Bercham Repot 2974/10 pada 7/8/2010 jam lebih kurang 9.15 pagi.

12. Pengadu dan rakan sebiliknya kemudiannya telah dirujuk ke Hospital Besar, Ipoh, Perak untuk tujuan pemeriksaan Doktor Pakar Sakit Puan, Jabatan Obstetriks & Gynaecology iaitu Dr. Andrea Angeline Dass dan hasil pemeriksaan beliau mendapati ada koyakan lama pada selaput dara pengadu posisi jam 4 o'clock dan akibat koyakan selaput dara dan tersebut adalah tusukan objek tumpul. Objek tumpul juga boleh disimpulkan seperti alat kemaluan lelaki. Manakala rakan sebilik pengadu diperika oleh Doktor Pakar Sakit Puan, Jabatan Obstetriks & Gynaecology iaitu Dr. Andrea Angeline Dass dan hasil pemeriksaan beliau mendapati ada koyakan lama pada selaput dara pengadu posisi jam 3, 5, 9 o'clock dan akibat koyakan selaput dara dan tersebut adalah tusukan objek tumpul. Objek tumpul juga boleh disimpulkan seperti alat kemaluan lelaki.

13. Pada 19/10/2010 jam lebih kurang 12.30 tengahari, tangkapan dibuat ke atas tertuduh.

14. Sampel dari tubuh badan mangsa dan tertuduh telah diambil, Ujian DNA juga telah dibuat dan keputusan DNA bertarikh 22/12/2010 mendapati bahawa 'a mixed DNA profile of a male and a female individual was developed from swab 'F3' where the donors of bloodstaines specimen 'F1(A)' labelled Mohd Khairi bin Bahauddin' were indentified as a male and female contributor respectively of this mixed DNA profile. Laporan DNA dikeluarkan oleh Pn. Padillah Yahya.

15. Berdasarkan keterangan di atas tertuduh telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan dan Seksyen 392 Kanun Keseksaan. Tertuduh telah mengaku perbuatan tersebut.

Bertarikh : 26 Mac 2014

[5] The sentences in both cases were ordered to run concurrently from the date of arrest ie 14 October 2010.

[6] The appellant was dissatisfied with the sentences and hence this appeal. The main contentions of the appellant were that the sentences were manifestly inadequate as the offences committed by the respondent were serious offences and that the learned sessions judge had erred in ordering the sentences to run concurrently.

[7] The other grounds in the appellant's petition of appeal can be found at pages five to seven of the appeal record.

[8] In her submissions, the learned deputy public prosecutor on behalf of the appellant stressed upon the fact that the sentences passed by the learned sessions court judge were manifestly inadequate and that the learned sessions court judge was just paying lip service when he stated that he took into consideration the public interest. The learned deputy public prosecutor pointed out that in the grounds of judgment of the learned sessions court judge at para [25], there was just a one liner stating that the learned sessions court judge took into consideration of the public interest. It was obvious from the grounds of judgment of the learned sessions court judge, more weight was given to the plea of guilty by the respondent instead of the public interest.

[9] The learned deputy public prosecutor further submitted that the learned sessions court judge failed to take into account the seriousness of the offence of rape and armed robbery. The facts of the case revealed that the respondent was ever ready to commit the crimes. The crimes committed by the respondent were executed in a house which is supposed to be a castle to everyone. The respondent took advantage on the victims who were 17 and 18 years old at the time of the incidents. The positive DNA evidence had further strengthened the

case against the respondent and the learned sessions court judge failed to take into account all these factors.

[10] Previous record of convictions of the respondent were also produced by the learned deputy public prosecutor. This record was obtained from the 'Pusat Pendaftaran Penjenayah' Bukit Aman marked as 'P2'. The 'sitrep' at p 87 of the appeal record is the same as 'P2' except for more detail information can be found in the latter. The information contained in the said record, ie P2 are as follows:

Tempat	Tarikh	Kesalahan dan Ordinan	Hukuman	No. Kes dan Penjara	Tandatangan
Mahkamah	29/7/2008	1. Rompak	1. 4 tahun penjara	No. Kes 62-145-2003	NACHRUDDIN
Seksyen 1,		Sek 392 KK	dtt. 13.12.2003	Sitiawan Rpt:7597/2003	B MUSTAFA
Ipoh					
		2. Rogol	2. 7 tahun penjara		
		Sek. 376 KK	dtt. 13.12.2003 dan		
			3 sebatan		
Mahkamah	14/01/2011	Pencerobohan Rumah	6 bulan penjara dtt	Kes No: 83-1700/2010.	NACHRUDDIN
Magistrate 4		Sek : 451 KK	14.10.2010	Kg. Rapat Rpt: 4894/2010	B MUSTAFA
Ipoh					
Mahkamah	14/02/2011	Seksaan bagi Kesalahan	24 bulan penjara	Kes No: 83-1702/2010.	NACHRUDDIN
Magistrate 4		Rompak	dtt 14.10.2010	Sg Senam Rpt: 8662/2010	B MUSTAFA
Ipoh		Sek: 392 KK			
Mahkamah	1/6/2011	1) Samun	1) 24 bulan penjara	Kes No. 83-783-10. Kulim	NACHRUDDIN
Magistrate		Sek 392 KK	dtt 2/11/10.	Rpt. No. 7965/10. Tapah	B MUSTAFA
Kulim				Pr No. 7-03-04516.	
		2) Menyerang/menggunakan	2) 20 bulan penjara		
		kekerasan jenayah	dtt 2/11/10		
		kpd seseorang dengan niat			
		mencabul			
		Sek : 354 KK			
Mahkamah	7/7/2011	Rogol	Penjara 8 thn dtt	Kes No. 62-86-2010 Telok	NACHRUDDIN
Sesyen		Sek. 376 KK	27.10.10 & 5	Intan Rpt:6036/2010.	B MUSTAFA
Teluk Intan			sebatan	Tapah Pr. No 7-03-04516	
				ATH	

[11] The learned deputy public prosecutor summed up her submissions by highlighting that the previous convictions showed that the respondent had committed the crimes of rape and robbery more than one occasion. The learned deputy public prosecutor prayed for all the sentences to run consecutively after the respondent has served the sentence for another offence of rape where he was sentenced to eight years of imprisonment from the date of

his arrest ie 27 October 2010, and five strokes of whipping (Case No 62-86 of 2010 Telok Intan Rpt:6036/2010).

[12] The learned counsel for the respondent on the other hand had urged this court to be slow in disturbing the finding and the sentences passed by the learned sessions court judge. The learned counsel submitted that the learned sessions court judge had taken into account all the issues raised by the prosecution including the public interest. The learned counsel argued that s 282(d) of the Criminal Procedure Code, stated that every sentence of imprisonment shall take effect from the date on which it was passed unless the court passing the sentence otherwise directs. The learned counsel further submitted that at the sessions court, the learned deputy (who was a different person from the learned deputy appearing before this court) did not ask for the sentences to run consecutively. Further submission by learned counsel, inter alia, urged this court to temper justice with mercy as the sentences if ordered to run consecutively will have a crushing effect on the respondent.

FINDINGS OF THIS COURT.

[13] The commencement of sentence of imprisonment is governed by ss 282(d) and 292 of the Criminal Procedure Code.

[14] The Court of Appeal in the case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534; [2004]2 CLJ 572 through the judgment written by Augustine Paul JCA explained the rationale of both ss 282(d) and 292 as follows:

> The commencement of a sentence of imprisonment is governed by s 282(d) and s 292 of the Criminal Procedure Code ('s 282(d)' and 's 292' respectively). They read as follows:
>
> Section 282
>
> With regard to sentences of imprisonment the following provisions shall be followed:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) every sentence of imprisonment shall take effect from the date on which it was passed unless the court passing the sentence otherwise directs.

Section 292

(1) When a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the court awarding the sentence may direct.

(2) A sentence of death shall be executed notwithstanding the pendency of any sentence of imprisonment.

(3) Nothing in subsection (1) shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

Section 282(d) prescribes the general rule that a sentence of imprisonment shall take effect from the date on which it was passed unless the court passing the sentence otherwise directs. Section 292 is a specific provision dealing with the date of commencement of a sentence of imprisonment of a person who is already undergoing imprisonment. Under this section the court may order the imprisonment to commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced. An order that the subsequent prison term is to start immediately does not negate s 292(2) as adverted to in *Shafruddin Selengka v PP* [1994] 3 MLJ 750; [1994] 4 CLJ 762. It is expressly authorised by s 292(1) and what is prohibited is only that the term of imprisonment cannot commence at any point of time prior to the date of conviction. To that extent it cannot be concurrent to a prison term being served but will be part-concurrent. The object of s 292(2) can be discerned upon a ratiocination of the phrase 'undergoing a sentence of imprisonment' in s 292(1). This is explained in Sarkar on Criminal Procedure, 7th edn at p 1251 in the following terms:

A person sentenced to imprisonment must, for the purpose of s 427, be deemed to be undergoing that sentence from the very moment the sentence is passed. The accused may be on bail or in custody in the earlier case at the time of passing of the subsequent sentence. Literal construction of the terminology 'undergoing a sentence of imprisonment' would lead to absurd results especially where two separate sentences are awarded one after the other on one day in two separate trials. Either the Judge would not exercise the discretion only because in earlier case (the) convicted (person) had not gone inside the jail by that time or he will have to actually send the convict inside the jail some time and call him back immediately to pronounce judgment in the second case. Such absurd and farcical situation could not be said to have been intended by the legislature (*Sadashiv Chhokha Sabte v State of Maharashtra* [1993] Cr LJ 1469 (Bom) (DB)).

Section 292(2) resolves the problem identified in the above passage. Pursuant to the subsection where a person is, say, on bail in respect of a prison term and is sentenced to imprisonment with immediate effect to another prison term for a subsequent conviction he will not thereby be excused from any part of the punishment to which he is liable upon his former conviction.

The combined effect of s 282 and s 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v PP* [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223).

[15] In the same case *Bachik Abdul Rahman v Public Prosecutor*, the Court of Appeal further stated that the exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the sentences should be consecutive or to run on some other dates, the Court of Appeal stated that the courts should be guided by the one transaction rule.

[16] The Court of Appeal stated at p 579:

> The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v Saleem* [1964] Crim LR 482; *R v Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v PP* [1979] 1 LNS 36; [1979] 2 MLJ 88; *Amrita Lai Hazra v Emperor* 42 Cal 957; *Chin Choy v PP* [1955] 1 LNS 17; [1955] MLJ 236). The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v PP* [1992] 1 SLR 81 at p 83:
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> The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v Faulkner* [1972] 56 Cr App R 594,*R v Wheatley* [1983] 5 Cr App R (S) 417 and *R v Skinner* (1986) 8 CrApp R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.
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> In explaining the totality principle His Lordship referred (at p 85) to the view of DA Thomas in *Principles of Sentencing*, 2nd Ed at pp 57–58:
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> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his record and prospects. In this regard reference is also made to Emmins on *Sentencing*, 2nd Ed, p 151:
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> It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.

[17] One transaction is where the commission of one offence is dependent

on the completion of another offence that makes both offences so link to each other that it is impossible to commit the second offence without the first offence. Example of this is; in committing a crime of criminal breach of trust, accused had to commit forgery to sign the check to enable him to get the same money that he was entrusted with. Therefore, the criminal breach of trust and the forgery are committed in one transaction.

[18] In this case before this court, even though the rape and the robbery were committed on the same victim in the first and second charge of the first case, and in the first and second charge of the second case and committed at around the same time and at the same place, there was no necessity to commit the second offence after committing the first. Both the offences do not depend on each other. They are obviously distinct in nature. They were unrelated. The offence of rape and robbery could not be said to be subsidiary to one another. It is to be noted as well that different victims were involved in both cases. Each and every element of the one transaction principles must exist for the one transaction rule to apply and for a concurrent sentence to be imposed. Again, in applying the test, the facts of the respondent's case before this court do not meet the said rule.

[19] The judgment of learned sessions court judge failed to illuminate the reasons that compelled him to order the sentence of imprisonment to be concurrent in respect of all the offences. In fact, there was no justification at all in the said judgment of the learned sessions court judge on why the sentences were to run concurrently. The learned sessions court judge gave so much weight to the plea of guilty of the respondent that in stating he took into account the public interest, seriousness of the crimes committed and the antecedents of the same crimes committed by the respondent, he failed to reflect these factors in his findings and sentences imposed. This court agreed with the learned deputy public prosecutor's submission, in that the learned sessions court judge was just paying lip service by saying the crime committed was serious and that he had taken into account the public interest.

[20] This court also agreed with the submission of learned counsel that this court must be slow in interfering with the findings and sentence passed by the learned sessions court judge unless the trial court had erred in applying the correct principles of sentencing or had embarked on some unauthorised or extraneous exercise of discretion. In this case, this court found that there were cogent reasons to interfere with the findings made by the learned sessions judge. On the facts of this case, to impose the concurrent sentences would not be appropriate as it did not reflect the seriousness of the offence committed by the respondent.

[21] Rape and robbery are heinous crime which must be severely punished. In this case there were three victims. Three of them were robbed. Two of the victims were also raped. In committing the crimes, the respondent had also used dangerous weapon to threaten the victims. The victims' lives were at stake during the incidents. The sentences passed must truly reflect the fact that in this case the appellant had committed three distinct offences and that he was being duly punished. This could only be achieved by ordering the sentences to run consecutively.

[22] The offence of rape and robbery are the worst and blatant violation and transgressions of human rights and dignity. The chastity of two women was violently tugged by the respondent. The victim in the third charge of the first case was indeed fortunate for not being raped by the respondent. It could not be denied that the trauma suffered by all the three victims in this case would last forever. Two of the victims gave impact statements in the sessions court judge on 26 March 2014. The statements of both victims speak volumes of the trauma they were still suffering. Concurrent sentences passed would not do any justice to the victims who would surely have to bear forever the ugly memory of being rape and robbed. This was certainly a case where this court would disturb the order of concurrent sentences.

[23] In this case, the commission of the subsequent offences show the depth of the darkness of the respondent's heart in perpetuating the crime against such helpless victims in the most despicable and heinous manner. The public would cry for protection against such criminal who has no conscience whatsoever. The law must step in not only to show its disapproval but also to prevent the recurrence of such crime in the very vein of the society.

[24] As stated by Ahmad Maarop J (as His Lordship then was) in the High Court case of *Mohd Zandere bin Ariffin v Public Prosecutor* [2006] 5 MLJ 685:

> (3) The offences committed by the respondent is an outraged to the feeling of the community, warranting even the maximum sentences to be imposed on him. Furthermore the prevalence of this type of offence must also be taken into consideration by the court in assessing sentence. Public interest demands that sentences which showed the society's utter abhorrence for this type of offence be passed. The sentences passed must serve as a plain warning that in this country the severest possible penalty awaits any person who commits crimes of incest. The element of public interest and the consideration that the offences committed by the appellant were very grave must prevail and override the crushing effect which the sentences will have on the appellant.

[25] The respondent in this case is not suitable to be with the public especially to the womenfolk. He is a danger to the public. He must be incarcerated from the society for a longer period. The retribution factor must also be taken into account to reflect the abhorrence of the public against the heinous crimes committed by the respondent.

[26] The seriousness of the offences committed by the appellant warrants a lengthy imprisonment sentence. Even though the sentences imposed will have a crushing effect on the appellant, the seriousness of the offences committed and the demand of protection of the public interest forfeited the interest of the appellant. Augustine Paul JCA in the same case of *Bachik bin Abdul Rahman v PP* further stated at p 579 of the case:

> In explaining the totality principle, His Lordship referred (at p 85) to the view of DA Thomas in *Principles of Sentencing* (2nd Ed) at pp 57–58: [2004] 2 MLJ 534 at 540
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> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his records and prospects.
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> In this regard, reference is also made to Emmins on *Sentencing* (2nd Ed) p 151:
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> It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.
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> There will be cases properly described as crushing the hope in the offender of reformation and a return to a desirable life but in which the offender has, by his criminal acts, forfeited any right to have his sentence reduced on that account (see *Crowley and Garner v R* (1991) 55 A Crim R 201). As O'Bryan J said in *R v Vaitos* (1981) 4 A Crim R 238 at p 301:
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> I have some difficulty appreciating the concept that a richly deserved sentence, not manifestly excessive, should be disturbed because the person upon whom the sentence is imposed may feel crushed by it. It is quite true that the applicant has to face a very long term of imprisonment before he will be released and because he is a comparatively young man, many of the best years of his life will be spent in custody. However, from the community point of view, his detention for a very substantial period is necessary to protect females from his criminal behaviour.
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> Young CJ said in that case that the question of whether the sentence imposed is crushing cannot be answered mathematically by reference to the offender's age and the length of sentence to be served but by the circumstances of the case.

[27] The respondent is a repeated offender, no doubt. The previous record of convictions in 'P2' revealed that fact. This court found that the learned judge failed to deliberate on this matter. The last offence of rape was committed by the respondent in 2010 which he is now serving the sentence. The offences committed in the cases before this court were committed in the same year. In other words, in 2010 alone the respondent had committed several offences of rape involving many victims. In the same year again, he had also committed the offences under ss 392 and s 354 of the Penal Code. It was glaring that the respondent was a habitual offender. The records in 'P2' showed that way back in 2003–2010, the offences of robbery and rape had been the respondent's modus operandi. If he were not to be isolated from the public, question is, who would be his next victim?

[28] This court took into account of the fact that the learned sessions court judge had taken into account the plea of guilty of the respondent but as stated earlier, more weight was given to the said plea compared to the public interest. It would not be an exaggeration to state that the respondent is a serial rapist. Apart from committing rape, he robbed. He used dangerous weapon to commit the robbery. Therefore, this court is of the view that the severity of the offences committed by the respondent and the existence of several previous convictions defeated the mitigating effect of the guilty plea. The guilty plea does not automatically entitle the respondent to a lesser punishment.

[29] In the case of *Bachik Abdul Rahman v PP*, the Court of Appeal held:

> [2] One of the principles in sentencing is that a convicted person should be given a discount for pleading guilty. A reduction of about one third of the sentence that would otherwise have been imposed is normally given. This, however, is not a strict rule and the court may, in the exercise of its discretion, refuse to grant any discount. The severity of the offence or the existence of a previous conviction may outweigh the mitigating effect of the guilty plea; so may the demands of public interest for a deterrent sentence as well as the absence of a good defence or of other mitigating factors. The guilty plea does not automatically entitle the convict to a lesser punishment. In the instant case, the sessions judge had considered all these factors before deciding that the accused's plea of guilty could not operate as a mitigating factor.

[30] In the case of *Public Prosecutor v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181; [1998] 2 CLJ 370 Augustine Paul J stated the same principle:

> In the court's opinion the string of previous convictions of the accused had reached such a point that the mitigating factors in his favour had been exhausted. His involvement in crime immediately after coming out of prison, after having served a five-year term, indicated his difficulty in reforming. In his own interest it was best that he re-entered prison for the longest period possible.

[31] This court had also perused the mitigation forwarded by the respondent at the sessions court at p 35 of the appeal record and found that there were no special reasons for this court to tamper justice with mercy. The strings of previous convictions failed to persuade this court to sympathise the respondent.

[32] It is true that the appellant has to face a very long term of imprisonment before he will be released. He is also a young man and many of his best years of his life will be spent in custody. However from the public interest view, his detention for a substantial period is necessary to protect women and girls in particular, from his criminal behaviour.

[33] For the reasons stated above, this court would not disturb the sentences imposed by the learned sessions court judge for each charge as the sentences were within the ambit of the punishments prescribed under the law. The sentences of whipping in the charges were also upheld.

[34] Nevertheless, this court was of the view that the learned sessions court judge had erred in ordering the sentences to run concurrently. Therefore, the order of the learned sessions court judge for the sentences to run concurrently was set aside. In substitution, this court ordered for the sentences for each charge in both cases (62JS-1-08 of 2013 & 62JS-2-08 of 2013) to run consecutively. This court further ordered for the sentences to run after the respondent has served his imprisonment sentence in case No 62-86 of 2010 Teluk Intan Rpt 6036 of 2010 of which he is now serving. This would mean the respondent will have to serve a total of 45 years of imprisonment in this case.

[35] While it was true that the total period of 45 years imprisonment was long and would have a crushing effect on the respondent, bearing in mind his relatively young age, the fact remains the respondent had violated the victims without any conscience to human dignity. He deserved a deterrent sentence. This court believed that the sentences imposed commensurate with the offences committed and were not manifestly excessive given the facts of the case, the circumstances of the offences and the background of the respondent.

[36] Hence, the public prosecutor's appeal was allowed.

Appeal allowed.

Reported by Afiq Mohamad Noor